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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

GUSTAVO DELACRUZ,

Defendant and Appellant.

F073639

(Super. Ct. No. BF151443A)

**OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Gary T. Friedman, Judge.

Paul V. Carroll and Victoria H. Stafford, under appointment by the Court of Appeal, Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Darren K. Indermill, Deputy Attorneys General, for Plaintiff and Respondent.

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Delacruz argues that his right to confrontation under the Sixth Amendment to the United States Constitution were prejudicially violated at trial, necessitating reversal of his convictions. We affirm.

### **PROCEDURAL HISTORY**

Delacruz was charged by information with second degree murder, gross vehicular manslaughter, and driving with a license that was suspended or revoked for driving under the influence of alcohol and/or drugs. (Pen. Code,<sup>1</sup> §§ 187, subd. (a), 191.5, subd. (a); Veh. Code, § 14601.2, subd. (a).) A jury found him guilty of all counts. He was sentenced to an indeterminate term of 15 years to life on the murder count, 10 years on the gross vehicular manslaughter count (stayed pursuant to § 654), and 180 days in jail for driving with a suspended or revoked license (concurrent).

### **FACTS**

A road accident involving vehicles driven by Delacruz and Taylor Embree occurred at approximately 4:19 a.m. on October 17, 2013. Embree was driving a 2010 gray Chevy Colorado truck and Delacruz was driving a 1998 white Ford Explorer. The crash occurred on Comanche Drive, north of Breckenridge Road, in Kern County. In the collision, the cab portion of Embree's truck detached from the chassis and the bed. Embree was killed in the crash.

#### ***Testimony of Embree's Wife, Britney***

Embree's wife, Britney, testified for the prosecution. Embree lived in South Lake, by Lake Isabella, and worked in Arvin for Granite Construction. On the night of the accident, Embree came home from work at 9:30 p.m., after a 15-hour shift. Britney "had dinner ready when he came home so that he could eat and get to bed as quickly as he could." "[H]e ate maybe within ten minutes, and took a shower"; his work was "labor-intensive" and he had come home "pretty dirty." Britney continued: "And [then] we had

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<sup>1</sup> Subsequent statutory references are to the Penal Code unless otherwise specified.

just a little bit of time to visit before it was time to go to bed, and he always kissed our son goodnight when he was going to sleep.” “So, I would say by 10:00 he was in bed,” she added.

When Embree’s alarms went off later that morning around 3:00 a.m., Britney “just did [her], kind of, normal thing of hitting him, making sure he got out of bed.” He left for work around 3:30 a.m. Britney would leave the coffee pot ready and he would take a “big coffee cup” with him. Britney testified that their son woke up crying after Embree got dressed, so Embree gave him a cup of milk before leaving. Embree then came to say goodbye to Britney, who gave him a hug and told him she loved him. She also told him to “be safe” because “[h]e had just shared that he had had a close call on the same road recently, so [she] was just worried about him driving.”

Embree “normally started [work] around the same time [every day], and then he was just done whenever they were done for the day.” That particular week he had been working long shifts, 10 hours or longer. Britney noted: “[W]ork was really important to him, so he was always very concerned that he was up and ready to go and the first person to be at work.”

Britney testified that Embree “had never had a drink of alcohol in his life,” and it was the “same thing” as to drugs.

#### ***Expert Testimony of California Highway Patrol Officer Michael Bright***

Officer Michael Bright had worked for the California Highway Patrol (CHP) for 21 years. He was a “traffic reconstruction specialist assigned to the central division Multidisciplinary Accident Investigation Team,” also known as the MAIT team. He was the “lead investigator” on a six-person team that investigated the accident involving Delacruz and Embree and performed the accident reconstruction for this crash.

Bright described the factors taken into consideration in accident reconstruction: “The general topics that we look into are three things, human, vehicle, and the environmental. [¶] In the environmental we look at the roadway configuration, is there

anything, in particular, about this roadway which may have contributed to the collision. We look at the vehicles, is there anything particular about this vehicle which could have contributed to the collision. And then we look at the human factors, what was it that the drivers or the people involved in the collision did which may have contributed to the collision.”

In performing the accident reconstruction, Bright and his team first went, on October 23, 2013, to the scene of the accident. In terms of locating the area of impact, investigators “typically look for evidence on the roadway that can show [where the impact occurred].” Based on evidence at the scene, including “tire friction marks” and “chops or gouges” in the pavement, the team was able to identify the area of impact.

In addition, the team conducted a time-position analysis, whereby they determined the location and orientation of the cars “in the pre-collision scenario,” as well as at the points of “first contact” and “maximum engagement” (“maximum engagement” is the point “when the collision forces are the greatest as the vehicles are interacting”). Bright explained how they did this: “Well, the first thing we did is we determined the maximum engagement location and orientation. Then we did the first contact. Then we worked backward from there.”

Thus, initially, “from the damage profiles that [the team] created [of] the cars and their crush characteristics, [they] were able to fit them together ... in [the] configuration they were [in] at maximum engagement.” Bright continued: “[Next], knowing where the damage is on the underside of Mr. Embree’s vehicle, we were able to take these two vehicles and then orient them on the ground to recreate their position not only relative to each other, but [also] relative to the environment, when the vehicles reached maximum engagement.” He explained, in this context, that tire friction marks and gouge marks are typically seen when vehicles involved in a crash reach “maximum engagement.” After establishing the orientation and position of the vehicles at the point of maximum engagement, the team “work[ed] the vehicles back a few feet,” thereby identifying the

respective position of each vehicle at the “moment of first contact.” Finally, “[a]fter finding out first contact [positions],” the team “work[ed] [the vehicles] [further] back to different stages in the pre-collision scenario.”

The investigation team concluded that the vehicles collided at the center divide in the roadway, as Embree was headed southbound and coming out of a curve and Delacruz was headed northbound and going into a curve. With reference to a dynamics diagram depicting each vehicle’s pre-collision path of travel, Bright explained: “So [Embree is] moving from left to right [on the diagram], crosses the center line, and arrives at the point of impact.” Embree’s truck was in an “oblique position,” as if he was making a left turn into the northbound lane. At the same time, “Mr. [Delacruz’s] vehicle approaches the collision scene from right to left. [The diagram] shows his vehicle straddling the center line as it approaches the area of impact.”

The investigation team also calculated the velocity of the cars at the moment of impact. Bright testified: “So based on the travel of the vehicles from the point of impact to the point of rest and the energy exerted to damage the vehicle, we determined that the Ford was traveling approximately 85 miles per hour at the moment of impact and the Chevy was traveling approximately 37 miles per hour at the moment of impact.” Bright noted that the speed determinations reflected a “high degree of certainty.” “[T]he speed limit was 55.”

Regarding the pre-collision stages, Bright testified: “The event data recorder for Mr. Embree’s vehicle gave us his speed, engine RPMs, and percent throttle in the last five seconds leading up to the collision. It also gave us the brake switch circuit state, which is basically was his foot on the brake or not, for the last eight seconds leading up to the collision.” Bright noted that five seconds before the crash, Embree “was at 62 miles an hour, 21-percent throttle.” “Two seconds before the crash his vehicle had slowed to 57 miles per hour, with zero-percent throttle.” Then, “[o]ne second before the crash, 47 miles per hour, zero-percent throttle.” Bright continued: “And then when we looked at

the brakes ... three seconds before the crash the brakes were off” and “[t]wo seconds before the crash the brakes were on,” so “[s]ome time in that interval, between two and three seconds, Mr. Embree applied his brakes.”

Delacruz’s Ford was not equipped with an event data recorder. The investigators had determined the Ford’s speed at the moment of impact was “85.44 miles per hour.” Investigators then worked to determine whether the Ford had braked in the moments leading up to the crash. Bright testified that in the absence of an event data recorder, “another thing that [investigators] can look at is the lights on the vehicle, light bulbs.” He explained: “When a light bulb is illuminated, an incandescent light bulb, the filament through which the electricity is conducted, it becomes heated, starts to glow, and it gives off light. So the heated element, if it’s subjected to a sudden shock or impact, it can deform, and that will give an indication of whether or not that element was illuminated or whether or not that lamp was on when the shock occurred.” Bright noted: “We looked at the lamps on both vehicles. The lamps from Mr. Embree’s vehicle showed that the filaments were illuminated, they were deformed, due to the shock to the vehicle at impact while the lamp was illuminated. So this indicated to us that his brake lights were on, indicating that his brakes were being applied and the vehicle was slowing. [¶] Mr. [Delacruz’s] vehicle, we looked at his brake lights and we found no indication whatsoever that the brake lamps were illuminated; therefore, it was concluded that the brakes on his vehicle were not applied in the moments leading up to the impact.” Bright concluded: “[So] as far as slowing coming into the collision, there’s no evidence of that.”

Bright testified that as part of the investigation, the team also considered human factors related to the crash. He noted: “We looked into the information that we got from the event data recorder showing Mr. Embree applying his brakes approximately two and half seconds prior to the crash. And when we see something like that, we look for a cause and effect. [¶] The effect is that he applied his brakes. What’s the cause of that?

You know, a road like this at his location, at his speed, there's not really any need for him to apply the brakes just in order to make it around the turn. He's almost to the end of the turn at this point. So we look to see, you know, what was the cause of him applying the brakes? [¶] We looked at what was the cause of his vehicle attaining that orientation oblique to the road. [¶] And so we look at all these things to try and see what are the drivers doing that are creating the events that lead up to the crash."

Regarding the state of intoxication or lack thereof of each vehicle operator, Bright noted: "Well, Mr. Embree, there were no indications that he was impaired in any way. [¶] On Mr. [Delacruz], there was the toxicological report that he was under the influence of alcohol and methamphetamine."

Finally, Bright testified as to the ultimate conclusions of the accident reconstruction investigation, i.e., his opinion with respect to the primary and associated collision factors: "We determined that the primary cause of the collision was Mr. [Delacruz] driving under the influence" and "the associated collision factor was his moving his vehicle to the left side of the solid and broken yellow line." Bright explained how he reached his opinion that Delacruz had moved his vehicle into Embree's lane, thereby causing the accident:

"We looked at the orientation of the vehicles at impact.

"Mr. [Delacruz's] vehicle was generally oriented in line with the center line of the road. His vehicle was straddling the road at impact and his vehicle was oriented in line with the center line of the road.

"Mr. Embree's vehicle was straddling the center line of the road, but his vehicle was oblique. The oblique position of Mr. Embree's vehicle was indicative of an evasive maneuver. That, coupled with the brake application that he did from two and a half seconds leading up to the crash all the way through impact, was all indicative of Mr. Embree trying to avoid something.

"Mr. [Delacruz's] vehicle oriented straight down the middle of the road, no indication of braking on the part of Mr. [Delacruz]. Couple that with the roadway configuration. In the [northbound] direction of travel of

Mr. [Delacruz], Mr. [Delacruz] is facing a right-hand curve in the road. Any failure to follow the road on his part would make his vehicle tend to drift to the left into the opposing lane.

“Mr. Embree’s vehicle, in the [southbound] direction that he’s proceeding, he’s in a left-hand curve. If there was a failure to negotiate the turn on his part, his vehicle would have drifted off to the right, off to the right shoulder, not into the opposing lane.

“Everything put together indicated to us that Mr. Embree’s movement over the center line was an avoidance maneuver. Mr. [Delacruz’s] position over the center line was either intentional or negligent.”

Bright added, with reference to a dynamics diagram,<sup>2</sup> that the front side of Embree’s vehicle was displaced from right to left and the vehicle came to rest on the east shoulder. At the same time, Delacruz’s vehicle went “broadside to the road [and] it overturned and tumbled,” eventually coming to rest against an embankment on the opposite or west shoulder.<sup>3</sup>

On cross-examination, Bright confirmed, that the orientation of Embree’s truck at the time of impact was oblique and “indicative of a left turn” made by Embree, such that the actual point of impact was in the northbound lane of Comanche Drive. Bright acknowledged he had assumed, given his knowledge of the direction Embree was coming from, that Embree was driving in the southbound lane (at least originally). Bright conceded there was no roadway evidence to support his conclusion regarding Embree’s pre-collision path of travel, i.e., that he was traveling in the southbound lane. Bright also acknowledged there was no “physical barrier to prevent [Embree] from being in the opposing lane.”

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<sup>2</sup> Bright explained that “[a] dynamics diagram is a diagram that [investigators] prepare showing the motion of each vehicle in the moments leading up to the moment of impact and as the vehicles travel from the point of impact to the point of rest.”

<sup>3</sup> Another CHP officer, who reported to the scene shortly after the crash occurred, further clarified that Delacruz’s Ford was found to the north of Embree’s Chevy truck, up against an embankment on the west side of Comanche Drive.



As to the issue of whether Delacruz braked just ahead of the collision, Bright agreed that the evidence did not conclusively establish a failure to brake, rather, there was no evidence of braking. Bright also agreed he could not rule out the possibility that Embree was the one who crossed the center line first and Delacruz moved left in order to avoid the collision. While such a scenario was possible, it was, as Bright noted in his report, improbable. Bright clarified that an evasive move on Delacruz's part was improbable because, just before impact, Delacruz's vehicle was "basically in line with the center line of the road," which position "doesn't tend to indicate turning to avoid something." Bright confirmed that both vehicles had their headlights on; he also confirmed that each lane on Comanche Drive was 12 feet wide and that there was a six-foot-wide shoulder on each side of the roadway.

On redirect, Bright noted that it took approximately 11 months to generate the accident reconstruction report. It was a thorough process involving review and feedback from every member of the investigation team as well as further review by a sergeant and lieutenant. Bright explained, in detail, that the investigation team had considered four separate scenarios.

The first scenario contemplated that Embree came off the curve in the road, drifted to the right side, and then overcorrected and moved over to the roadway's center line (where he was at the point of impact), such that Delacruz would move from the northbound lane to a position parallel with and straddling the center line (where Delacruz was at the point of impact). As to this scenario, Bright commented: "[Embree's] basically already applied his steering input to start this left curve. All he's got to do is hold on to the steering wheel. In order for him to drift off to the right side, he would actually have to kind of in the middle of the curve let go of the steering wheel for his car to go off to the right. So that was, you know, not supported by the evidence as far as human factors." Bright added: "And then when you consider what [Delacruz] would have to do to get to his position and orientation at impact, [Delacruz], if he had been

traveling down the middle of his own lane, he'd have to first turn his vehicle to the left to move it to the center line of the road, then turn to the right in order to achieve a position where he travels parallel to the road. This would require two turning movements, plus the perception and reaction time for him to see Mr. Embree's vehicle potentially crossing into his lane." Bright concluded "there was just not enough time for [Delacruz], number one, to even see such a movement and decide okay, I need to move my car, but then make two turning movements, one to the left, one to the right, to achieve that position and orientation." Accordingly, this scenario was ruled out.

The next scenario contemplated that Embree was driving on the center divide the entire way around the curve and, at the last minute, turned into the opposing lane, such that Delacruz would react and end up in his position in the center of the roadway. As to this scenario, Bright first noted that, based on "a statement from Mr. Embree's wife that he had had this close call; that he had been run off the road in that same stretch of road just a week before," it did not seem reasonable that Embree would "[go] through this blind curve" straddling the center line. Bright continued: "Now we go back to the information that we got from the event data recorder, and based on that we determined that Mr. Embree applied his brakes about two and a half seconds before the crash. For a person who's, you know, crossed out of his lane, the first reaction ... would be just to turn the car back, not a brake application. This was a hard brake application. It's not indicative of a person who drifted out of their lane. In fact, if Mr. Embree had been on the center line and applied his brakes, that would do nothing to move his vehicle back into his own lane. So that would require Mr. Embree to be straddling the road, two and a half seconds before the crash [and] decide okay, I'm going to apply my brakes right now, wait some period of time, and then decide to turn the steering wheel, and that was just unreasonable." As for Delacruz in this scenario, Bright testified: "If [Delacruz] was traveling in his own lane and he saw a car coming down the road straddling like this, making a turn to the left and then [a] turn to the right to position his vehicle on the center

line of the road would do nothing to avoid a collision with another car that's coming down the center of the road. [¶] So all of that put together, it just made that scenario unreasonable."

The third scenario contemplated that Embree began his course completely on the wrong side of the road. Bright noted this scenario was ruled out. He explained: "If Mr. Embree's vehicle had started completely in the opposing lane, he needs to move to the right in order to get to the center line. [¶] Now his vehicle at impact is in a left-turn orientation. There's no way for him to move his vehicle to the right while turning left."

The fourth scenario contemplated was that Delacruz was fully in the southbound lane prior to becoming aligned with the center divide. As to this scenario, Bright commented: "Well, we considered the possibility that Mr. [Delacruz's] vehicle had crossed deeper into Mr. Embree's lane. There was no evidence of that, we couldn't rule it out, but it was a possibility."

Finally, the prosecutor asked Bright to further explain his ultimate conclusion that Embree was traveling within the southbound lane and turned to the left in response to Delacruz's encroachment into that lane. Bright responded:

"Again, it's all about human, vehicle, and environment. We have to look at all three things. All three things fit together.

"We considered the statement [from Embree's wife, Britney] about Mr. Embree having a near collision on that same stretch of road. Based upon that, we concluded that he was likely attentive to his driving. He was most likely hyperalert to what's going on out there. He's paying more attention than somebody who just is driving through here more routinely.

"We looked at the environment, the curvature of the road. You know, if one vehicle's in a left-hand curve, it's going to want to tend to go off the right side. If another vehicle's in a right-hand curve, it's going to want to tend to go off to the left side. So those things were significant to us.

"This brake application of Mr. Embree two and a half seconds before the crash was significant to us, number one, because of the time. It occurred so much before the crash.

“And secondly, the nature in which he applies the brakes. This is a hard brake application. It’s not just, you know, I’m going to tap my brakes. You know, we looked at that pre-crash speed on Mr. Embree’s vehicle and, yeah, he was going 63. The speed limit was 55. You don’t need to slam on your brakes and slow to 37 just because you’re going a few miles over the speed limit. The 63 miles per hour on the part of Mr. Embree was not significant in his ability to go around this curve. He can go around this curve at a faster speed than 63. To the contrary, Mr. [Delacruz’s] vehicle was going – well, we determined 85 at impact. There was no evidence one way or the other to say in the pre-impact was he going faster or slower, but at such a speed it would be more difficult for Mr. [Delacruz] to get through that curve. That roadway wasn’t built for cars to go through there at 85 miles per hour.”

Bright also explained, with reference to a photograph of the crash site taken from Embree’s vantage point as he drove southbound: “The roadway right in this area as Mr. Embree approached the collision scene transitions from having an uphill embankment on his right side to a downhill embankment on his right side. So both of those limit a driver traveling in this direction from moving off to the right side. You’ve got the hazard of the embankment going up and you’ve got the drop-off going down. Either one of those would have to be taken into consideration for a driver facing a hazard coming down this road.” Bright added: “Mr [Delacruz’s] vehicle was negotiating a right-hand curve, so the laws of physics say that his vehicle’s going to want to tend to go straight, which, in perspective to the road, is to the left. So that would continue to carry the vehicle completely into Mr. Embree’s lane or even onto that right shoulder there. So that would be something that a driver from the perspective of Mr. Embree would have to take into consideration as well.”

### ***Percipient and Expert Testimony of CHP Officer Scott Evans***

Officer Scott Evans had worked for the CHP for 10 years. Officer Evans had extensive experience in determining whether a person was under the influence of alcohol.

Based on an emergency phone call at 4:19 a.m. on October 17, 2013, Evans reported to the site of a road accident at Comanche Drive, north of Breckenridge; he arrived at 4:40 a.m. or 4:45 a.m. The fire department and ambulance service were

already there. Embree was in the driver's seat of his Chevy Colorado truck's cab, wearing the seat belt. "He was deceased at the scene."

Officer Evans then described the location and condition of Delacruz's Ford Explorer. "[T]he 1998 Ford Explorer [was found] on its roof on the west side of Comanche Drive, up against an embankment, and this is north of the [Chevy] Colorado." He added: "There were several beer cans in and around the vehicle." "They were all Coors Light cans." Evans was able to point out several beer cans in photographs of the Explorer taken at the scene. Evans also identified a photograph of "[an 18-pack] box for Coors Light beer."

Evans described his interaction with Delacruz, whom Evans first talked to after he was loaded into the back of an ambulance. Delacruz told Evans "he was coming from Arvin and trying to go home." Evans utilized his training and experience in evaluating whether Delacruz was under the influence of alcohol. He testified: "Once I got into the back of the ambulance with him, I was able to smell a very strong odor of an alcoholic beverage inside the vehicle, inside the ambulance. I also noted his eyes were red and watery. And when he spoke it was with a slur." Evans noted that the strong alcohol odor was emanating from Delacruz's breath. Evans found it significant that Delacruz was "slurring" and his eyes were "bloodshot, watery." Delacruz was transported to Kern Medical Center.

About an hour and a half later, Evans left the accident site to contact Delacruz at Kern Medical Center. There, Evans attempted to ask Delacruz specific questions about the crash. Evans noted: "If I asked him anything specific about the crash itself, he would just – just turn over and look the other way and just completely not answer my questions." However, Delacruz would answer more general questions. As Delacruz was still "strapped on a backboard with a C-collar applied to his neck," Evans could conduct only the horizontal gaze and vertical gaze nystagmus field sobriety tests. Asked to describe the results of these tests, Evans answered: "I saw all six of the six clues. I saw

the lack of smooth pursuit. I saw the distinctive sustained nystagmus at maximum deviation, as well as the angle of onset prior to 45 degrees.” Evans continued: “What I also observed in Mr. [Delacruz] was a vertical gaze nystagmus, which is when I complete the three [tests] I just showed you, I’ll go up. And if you see the bouncing of the eyes at that point, that indicates a high dosage for that particular person of [the relevant] intoxicant.” Nystagmus tests identify use of “three different categories of intoxicants,” specifically, inhalants, PCP, and depressants (including alcohol). Evans concluded Delacruz was under the influence of alcohol at the time of the collision. Evans further concluded that Delacruz was the proximate cause of the collision that resulted in Embree’s death. Accordingly, at 6:25 a.m., Evans “placed Mr. [Delacruz] under arrest for driving under the influence and vehicular manslaughter.”

Evans also testified that a sample of Delacruz’s blood was collected at the hospital, at 6:45 a.m. Evans determined that the accident had occurred some time before 4:19 a.m.

A few days after the accident, Evans returned to the hospital to question Delacruz further. Delacruz said he had left his home “off of Southgate” around 11 p.m. in his Ford Explorer, and gone to Breckenridge Road. He had two Coors Light beers before leaving. Delacruz explained that he likes “to go up there because it overlooks the city and he likes to sometimes get away and think about things.” He had been feeling “unhappy,” and when he feels that way he “likes to ‘pop a few.’” He left the area of Breckenridge Road between 2:00 and 3:00 a.m., approximately. He was not sure which direction he went in after leaving Breckenridge Road.

Evans described the area where the accident occurred: “It’s a very rural area and there’s no ambient lighting anywhere.” Evans subsequently went back to the site to evaluate “the condition of the roadway and the curvature of the roadway and how speed can affect the ability to maneuver that roadway.” Evans explained: “I actually enlisted the help of two other units, and what we did, we – I started off and the first time I went

northbound at 85 [miles per hour] and the other officers came southbound at 65 [miles per hour], and we tried to make the point we met was as close to the area of impact as possible.” Video cameras were rolling in both vehicles involved in the exercise. The officers got “close” to their goal of crossing at the area of impact. Evans was driving a Ford Explorer, and got up to 85 miles per hour, coming from the same direction as Delacruz. Evans testified: “As I came into that curve, that right-hand curve going northbound, it was quite uncomfortable. It surprised me how fast that curve came up on me and how much I had to cheat over to the right to make that work at that speed.” In fact, in attempting to negotiate the curve at that speed, Evans hit the rumble strip at the very edge of the road.

***Testimony of Maria Sanchez, Criminalist at Kern Regional Crime Lab***

Maria Sanchez, a criminalist at the Kern Regional Crime Lab operated by the Kern County District Attorney’s Office, testified that she tested Delacruz’s blood, which tested positive for methamphetamine and amphetamine. Sanchez further testified that taking alcohol and methamphetamine in combination results in a “synergistic effect,” such that the effect of each is “amplified.” She explained that methamphetamine acts as a stimulant when the user is “coming up in the high” and as a depressant when the user is “coming down from the drug.” Sanchez acknowledged that, in the initial phase, depending on the dose, there is an increase in alertness. However, when a user is coming down from a methamphetamine high, the user would feel symptoms of fatigue, sleepiness, and possibly, depression. Sanchez agreed, based on an academic article, that the interaction between alcohol and amphetamines is complex. However, Sanchez opined that the methamphetamine present in Delacruz’s system would not have negated the effects of alcohol in his system.

***Testimony of Ivette Ruvalcaba, Criminalist at Kern Regional Crime Lab***

Ivette Ruvalcaba, a criminalist at the Kern Regional Crime Lab testified for the prosecution. Ruvalcaba had no personal involvement with the vials of Delacruz’s blood

obtained at the hospital and provided by law enforcement to the Kern Regional Crime Lab. However, Ruvalcaba testified: “I did perform the analysis” to ascertain the blood-alcohol concentration of Delacruz’s blood. She explained what that meant: “That means that I reviewed the case records. I reviewed the raw data. I reviewed the calibration data, the controls that were [run]. I reviewed the results of the forensic testing. I reviewed the chain of custody that was associated with the case. I reviewed the photographs that were taken with the case. And then I made an interpretation as to the results that were generated and I was the one who signed off on the report. So I performed the analysis portion of the testing.” In short, Ruvalcaba did the “analysis of the blood-alcohol test” performed on blood collected from Delacruz, so as to determine the blood-alcohol concentration thereof. The prosecutor and Ruvalcaba then had the following exchange:

“Q. Can you tell us *very generally* how it is that you go about testing samples such as the ones – the blood samples of Mr. [Delacruz], how you go about testing those for the presence of alcohol?

“A. Absolutely.

“Samples are submitted usually by law enforcement agencies, and the law enforcement agency will request a forensic test, like a blood-alcohol test, and the main question that they want us to attempt to answer is, A, is ethanol present and, B, if it is present, at what concentration.

“So we do that initially by calibrating our instrument. Our instrument that we use at the Kern Regional Crime Lab is an instrument that allows us to extract volatile compounds, separate those volatile compounds, and then identify those compounds based on the time they exit the instrument.

“The initial step is to calibrate that instrument, and what that means is we set a response relationship with a known concentration.

“Once that instrument is calibrated, we check for its accuracy, how accurate is the instrument? We do that by running known samples. Those known samples either contain alcohol at known concentrations or contain no alcohol. Those samples are either purchased [from] a different laboratory or a vendor or they’re prepared in-house.



“So once we verify that the instrument was calibrated appropriately and that it’s accurate, then we run unknown samples. Unknown samples are the forensic case samples that we’re trying to answer if there’s ethanol present and, if it is, at what concentration.

“Forensic samples, or unknown samples, are analyzed by taking a portion of the blood specimen at two different times. So we’re basically acquiring a potential blood-alcohol concentration, two different results at two different times.

“Once we determine if a sample contains ethanol and the concentration, then we determine if it’s reportable. If the sample is reportable, it’s because the instrument was calibrated appropriately, the instrument was accurate, and the results of the two measurements for that sample were precise or similar.

“The result is then – a report is then generated and the results are reported to the agency after all the data has been technically reviewed not only by the person performing the analysis, but also by a secondary analyst.

“Once both analysts agree as to the results, then a report is generated back to the agency answering that question that was initially asked of us.

“Q. Did you go through that entire process with respect to Mr. [Delacruz’s] blood?

“A. Yes, sir.

“Q. And when you did that, could you tell us what you found?

“A. Yes. [¶] ... [¶]

“The results that were reported were a blood-alcohol concentration of ... 0.10 percent.” (*Italics added.*)

Here, Ruvalcaba independently reached the conclusion that Delacruz’s blood-alcohol concentration was 0.10 percent and personally prepared and signed the report submitted to the agency. As noted above, her report to the CHP concluded that Delacruz’s blood-alcohol concentration was 0.10 percent.

On cross-examination by the defense, Ruvalcaba acknowledged that she did not take the blood sample out of the blood testing kit provided by law enforcement in this case, nor did she put that blood sample into the relevant instruments and run the

applicable forensic tests on the sample. Rather, a forensic technician, Corina Anderson, handled the vials of blood. Anderson also tested the blood sample using a “gas chromatograph/flame ionization detector” coupled with a “head space auto sampler.”

When asked about the process by which the gas chromatograph machine is calibrated, Ruvalcaba responded: “The calibration process consists of running approximately five calibrators or standard solutions at various alcohol levels. The response that is generated is then used by the instrument to generate a mathematical algorithm that is then used to determine the concentration in unknown samples. So the calibration process actually sets that mathematical algorithm.” Ruvalcaba further explained: “The samples are pipetted into auto-sampler vials and those samples are [run] and tested by the instrument. The instrument is then told these are calibration samples, and based on that sample type it will then generate a calibration curve.”

In testing samples, the gas chromatograph machine “generates actual raw data” which requires further analysis to compute the alcohol concentration of the samples. Ruvalcaba explained her own analysis: “The information that I’m looking at is I’m reviewing each chromatogram. I’m verifying that each chromatogram has at least one peak, the peak of the internal standard. This control is added to every sample and it helps me to determine that the instrument injection happened the way the [control and sample were] supposed to inject into the instrument.”<sup>4</sup> Ruvalcaba added: “So by reviewing the chromatograms, I’m able to tell if the concentrations are accurate. I’m able to tell if the instrument was calibrated correctly. I am able to tell if the positive and negative controls [i.e., controls with and without alcohol, respectively] that were used[,] show that the

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<sup>4</sup> Regarding the significance of a “peak,” Ruvalcaba explained: “What I mean by ‘peak,’ it is the signal that is generated by the instrument. When a compound exits the column, the flame ionization detector actually combusts carbon compounds, and when that combustion occurs there is an electrical response. The higher the concentration, the higher the response.”

instrument was accurate.<sup>5</sup> I'm also able to tell if there's any issues with the instrument based on the chromatograms that are printed." Ruvalcaba concluded: "[So] I look at the internal standard. I look at the peak height to ensure that that response is consistent with our historical responses. And I also verify – I compare one sequence against another to ensure precision; that the instrument was able to detect the concentration in the sample at two separate occasions, two separate results."

On cross-examination, Ruvalcaba further acknowledged that one of the runs involving Delacruz's blood was abandoned because of abnormalities in the resulting chromatograms. She explained that, in testing Delacruz's blood, the lab "ran a total of three different tests or three analytical batches," because under the applicable law, "a minimum of two reportable results that are precise or similar" are required before the results may be reported to the requesting agency. Ruvalcaba clarified what "run" means: "When I speak about a 'run,' I am talking about an analytical batch." She explained that, each time, Delacruz's blood sample was tested with a number of other forensic samples, controls, and calibrators, all of which together comprised one "analytical batch." Each sample in the analytical batch is associated with a separate chromatogram. The anomaly or abnormality detected in the abandoned run was not in Delacruz's blood sample but rather in unrelated samples and, in any event, the entire run was scrapped. However, by virtue of the two other runs, the lab obtained two separate blood-alcohol concentration results for Delacruz that were close enough to meet the legal requirements for reportable results (i.e., the two results were essentially identical). Based on the two reportable results, the lab reported to CHP that Delacruz's blood-alcohol concentration was 0.10 percent.

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<sup>5</sup> Regarding the role of controls, Ruvalcaba testified: "We have a series of controls that we know the [alcohol] concentration and we have controls that have no alcohol. [¶] So [these] controls are used to determine if the instrument, once it's calibrated, can it detect ethanol when there is ethanol? Can it identify a sample with no ethanol? And if it does detect ethanol, is the concentration that is reported accurate?"

The 0.10 percent blood-alcohol concentration reported by the lab, on the basis of Ruvalcaba's analysis, was a measure of the alcohol concentration in Delacruz's blood at the time the blood was drawn from his body. The alcohol concentration in his blood may have been different two and a half hours earlier (i.e., at the time of the collision). Blood-alcohol concentrations can go up or down over time, depending on the subject's drinking pattern, as well as the rate at which alcohol is absorbed from the stomach into the bloodstream in relation to the rate at which alcohol is eliminated from the body.

Ruvalcaba observed: "Once a person stops drinking, the peak maximum, *[i.e.,] the highest concentration a person [reaches]*, can [occur] up to five minutes later or ... two hours later." (Italics added.) Ruvalcaba further explained: "Once a person stops consuming alcohol, [at some point between five minutes and two hours later,] there is no more alcohol in the stomach that is being absorbed into the blood; therefore, soon after all the alcohol is absorbed, then the body is eliminating alcohol at a constant rate and now BAC will decrease with time."

The prosecutor and defense counsel asked Ruvalcaba to estimate a hypothetical subject's blood-alcohol concentration over time, under circumstances mirroring the circumstances of the instant case, with some additional variables (e.g., various alcohol-intake and food-intake patterns) plugged into the hypothetical. Ruvalcaba's answers varied depending on the drinking and eating patterns plugged into the hypotheticals. Since there was no evidence as to Delacruz's actual drinking and eating patterns on the night in question, the evidentiary value of Ruvalcaba's testimony in connection with the hypotheticals presented by each counsel was limited.

#### ***Testimony of Evangelina Guerra, Employee of Western Corrections***

Evangelina Guerra of Western Corrections testified that Western Corrections offers a "drunk driver's course" for defendants ordered to complete such a program by a court. The program is called Victim Impact Panel. Guerra described the program: "Victim [I]mpact [P]anel, what it is is basically a group of panel members that were

either drunk drivers or injured by drunk drivers, and they basically go over what happened to them, the consequences of it, and they basically share their sorrow.” Guerra testified that Delacruz completed this program in 2007, as ordered in a particular case.

***Delacruz’s Prior Driving-Under-the-Influence Convictions and Related Issues***

The court took judicial notice of Delacruz’s prior convictions under Vehicle Code section 23152, subdivision (a), for driving under the influence (DUI). The convictions occurred in 2007 and 2012, in two separate cases. Court documents related to these convictions showed that Delacruz pleaded guilty in each case and, before the pleas were entered, the respective judge admonished him that (1) being under the influence of alcohol or drugs, or both, impairs a person’s ability to safely operate a motor vehicle, (2) it is extremely dangerous to human life to drive while under the influence of alcohol and/or drugs, and (3) were he to continue to drive under the influence of alcohol or drugs, or both, and as a result thereof someone was killed, he could be charged with murder. In both cases, Delacruz signed a “Defendant Acknowledgment of Advisal Pursuant to Vehicle Code Section 23593(a)” form and his driver’s license was suspended.<sup>6</sup> Delacruz was required to enroll in DUI school and take the Victim Impact Panel class in connection with his 2007 conviction.

***Testimony of Dean Brewer, Defense Accident Reconstruction Expert***

Dean Brewer, the defense’s accident reconstruction expert, gained his expertise in traffic collision reconstruction when he was a traffic officer in a municipal police department. In that capacity he both attended relevant trainings and investigated and

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<sup>6</sup> Under Vehicle Code section 23593, courts are required to advise a defendant convicted of a violation of Vehicle Code section 23152 as follows: ““You are hereby advised that being under the influence of alcohol or drugs, or both, impairs your ability to safely operate a motor vehicle. Therefore, it is extremely dangerous to human life to drive while under the influence of alcohol or drugs, or both. If you continue to drive while under the influence of alcohol or drugs, or both, and, as result of that driving someone is killed, you can be charged with murder.””

reconstructed traffic accidents. Most of his 28-year police career was in the traffic division.

Brewer reviewed the CHP MAIT team's investigation documents and photographs, including the team's final report in this matter. He also went to the scene of the collision and inspected the vehicles involved in the collision. Brewer noted that many of the calculations performed by the CHP were ultimately somewhat subjective, given that many details—for example, the directions from which the vehicles came into the crash—were unknown.

Brewer agreed with the CHP's conclusion that the area of impact was in the northbound lane of Comanche Drive, near the roadway's center line. As noted in his report, Brewer also agreed with the CHP's findings regarding the speed and position of each vehicle at the time of impact. Specifically, he testified: "I actually agree with the [CHP's determination of] impact velocities, give or take. Same thing with the positioning on the roadway, give or take." Brewer did not come up with any information or calculations that indicated otherwise.

Brewer noted, however, that there was no hard or objective evidence, such as tire marks, scrub marks, and debris left by the vehicles, to show the pre-impact paths of travel. Therefore, the question of the trajectory of each vehicle was "relatively subjective looking at the evidence in this case." Officer Bright's opinion that Embree's truck was traveling in the center of the southbound lane and then turned left into the northbound lane just before the collision, was not supported by "markings or anything on the roadway [that would indicate] where the vehicle was in the roadway." The CHP's conclusion that Delacruz's vehicle did not make any evasive turning movement prior to the collision was similarly not supported by hard evidence. Brewer observed: "There probably is no evidence of a hard sharp turn because we don't see any marks and I would expect that possibly we would; however, it doesn't mean that there wasn't some turning going on, some sort of an evasive maneuver. We just don't see any marks in the roadway

to say one way or the other.” Similarly, there was no objective way definitively to determine which vehicle had crossed the center line first.

On cross-examination, Brewer acknowledged there was no evidence to show that Delacruz had applied his brakes at any point. Given Delacruz’s speed at impact, had he applied his brakes, he would have been traveling even faster prior to impact than the estimated impact speed. Had he not applied his brakes, he would have been accelerating through the collision. Each vehicle’s speed at the point of impact is a primary factor for accident reconstruction purposes.

The prosecutor then questioned Brewer about his conclusion that there was not enough evidence to say who crossed over the center line first. Specifically, the prosecutor asked: “Do you have a scenario – I mean, you said that there’s not enough evidence to say one way or the other, so am I wrong in assuming, sir, that you have a scenario in mind in which Taylor Embree crosses over the center divide first and the defendant, your client, arrives at his position in the roadway as a reaction to that?” Brewer answered: “That would be [the] only other possibility [but] I do not have a significant scenario in mind[,] because I just don’t have enough evidence to make that conclusion.” Brewer, however, added that even if Delacruz had moved over so as to straddle the center line in the first instance, Embree’s reaction of driving into the crash, as opposed to away from it, also did not make sense to Brewer. He concluded: “So I really don’t have a scenario that makes a whole lot of sense, because even if, like I said, [Delacruz] was straddling, I don’t understand driving into a crash.”

The prosecutor next questioned Brewer, with reference to an exhibit depicting the curve in the road at the accident site, as to indications that Embree had turned left into the northbound lane. In this context, the prosecutor and Brewer had the following exchange:

“Q. What I’m asking is if an individual is straddling the center divide and continues on their present course, they’re going to occupy the space that you would have [otherwise] turned into [on the right], right?”

“A. Okay, I didn’t realize you had wanted to know if he was going straight. You’re correct.

“Q. They’re going to occupy this space right here.

“A. Yes.

“Q. And you would have turned right there.

“A. If [he] had occupied that space I would have taken whatever evasive maneuver that I could.

“Q. You’d go left.

“A. If he’s occupying that space, yes.

“Q. What if he’s not occupying that space, but he’s about to?

“A. Brake and go to the right.

“Q. You’d brake and go to the right? [¶] How come?

“A. Because if the other person were – let’s say he did drift over and then corrects himself, I’m going to be smacking him head-on. So it just doesn’t make sense. Most – like I said, most people will drive away from an impending crash.

“Q. Right. But the impending crash is about to happen here. The individual comes on his present course, he’s going to occupy this space.

“You turn right, you get a broadside, right, the driver’s side? Right?

“A. Not necessarily. It would be more like – well, it depends on how strong or how sharp of a right turn he makes, but it would more of a sideswipe, probably.

“Q. And you might end up going off the edge there, right?

“A. I suppose.

“Q. Reasonable minds can differ, right? [¶] ... [¶]

“A. Yes.

“Q. I was asking you if you had a scenario in mind in which your client ends up in this position as part of an avoidance maneuver, to avoid Taylor Embree having crossed over the center divide before him. Right?



“A. Yes.

“Q. Do you have a scenario in mind?

“A. Not really.

“Q. Can’t even think of one.

“A. I can think of one, but there would be no foundation, you know, basically – [not] much concrete evidence to go by.

“Q. It wouldn’t fit the facts of this case.

“A. Well, if Mr. Embree was actually swerving in the road because he was fatigued and was in the wrong side of the road, and Mr. [Delacruz] made one evasive maneuver to try to go to the other side of the road because he doesn’t want collide and then Mr. Embree corrects himself, it could go the other direction. I mean, that’s possible, but –

“Q. Not very likely, right?

“A. It wouldn’t be one of the first things I would have concluded.

“Q. So he’d be coming off this curve, kind of weaving back and forth in the roadway is what you’re saying, and the defendant, as an avoidance maneuver, would also kind of be going back and forth?

“Is that what you’re ... saying?

“A. That’s what I offered.

“Q. Many things are possible, right?

“A. Yes.

“Q. It’s possible that a meteor came out of the sky and caused this whole thing, right?

“A. I didn’t check for that.

“Q. Many things are possible, right?

“A. Yes.”

[¶]...[¶]

“Q. When you were trying to determine how this collision happened, at any point did you make contact with your client and ask him?

“A. No.

“Q. That would have been important, right?

“A. It would have potentially shed some light, yes.

“Q. But you didn’t do that.

“A. No.”

## **DISCUSSION**

### ***I. Expert Opinion of Criminalist Ivette Ruvalcaba (Blood-Alcohol Concentration)***

Criminalist Ivette Ruvalcaba opined that blood drawn from Delacruz at Kern Medical Center had a blood-alcohol concentration of 0.10 percent. Ruvalcaba explained Delacruz’s blood was tested on a gas chromatography machine. Ruvalcaba did not personally run Delacruz’s blood samples through the gas chromatography machine. However, Ruvalcaba personally and independently analyzed the raw data or chromatograms generated by the machine, along with additional records, to determine Delacruz’s blood-alcohol concentration and reported the results of her analysis, in writing, to the CHP. Neither the records on which Ruvalcaba’s opinion was based, nor the written report reflecting the results of her analysis, were admitted into evidence. Delacruz argues that Ruvalcaba’s trial testimony regarding her opinion as to the blood-alcohol concentration of his blood, violated his right, under the confrontation clause of the Sixth Amendment to the United States Constitution, to confront witnesses against him. We independently review confrontation clause claims. (*People v. Hopson* (2017) 3 Cal.5th 424, 431.) Under the relevant precedents of our Supreme Court, specifically *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*) and *People v. Perez* (2018) 4 Cal.5th 421 (*Perez*), we must reject Delacruz’s contention that his right to confrontation was violated.

### **A. Evidence Code Section 402 Hearing on Admissibility of Ruvalcaba's Opinion**

The trial court conducted an Evidence Code section 402 hearing, *outside the presence of the jury*, with respect to Ruvalcaba's proffered trial testimony and opinion as to Delacruz's blood-alcohol concentration. At the hearing, Ruvalcaba described the process by which she arrived at her opinion that Delacruz's blood-alcohol concentration was 0.10 percent.

Ruvalcaba explained that forensic technician Corina Anderson conducted the actual forensic testing of Delacruz's blood samples, using a gas chromatography instrument along with a head space extractor and flame-ionization detector, all of which together comprise a large machine. Ruvalcaba did not personally handle the blood vials or load the blood samples into the machine. At the Kern Regional Crime Lab, forensic technicians load the samples and controls into the gas chromatograph, while criminalists like Ruvalcaba analyze the raw data (chromatograms) subsequently generated by the machine. Ruvalcaba interpreted all the relevant chromatograms in this case. She explained the scope of the analysis: "Every sample has an internal standard, so we're looking for that internal standard peak. We're looking to ensure that the response is a certain level. If there's ethanol present, then we're looking for that peak at the retention time we expect ethanol to be present. We're looking at the chromatograms, we're looking at the chromatograms from the calibrators, we're looking at the chromatograms from the positive and negative controls (i.e., controls with and without alcohol, respectively), and from each forensic result and each test that was generated as well."

Ruvalcaba explained that she could ascertain, with reference to the chromatograms for the positive and negative controls, whether the machine was working properly during any given run on an analytical batch. The chromatograms also contained "other clues" indicating whether the machine was working properly. Ruvalcaba reviewed the relevant chromatograms in this case and verified that the gas chromatographer was working properly at the time of the relevant tests. The prosecutor asked Ruvalcaba: "So you

analyze the data. You check the results. You make the analysis. You ensure that the machine was operating properly. About the only thing that you don't do is load the samples physically into the machine, correct?" Ruvalcaba answered: "Correct."

Ruvalcaba noted that, in addition to running the analytical batch through the machine, the forensic technician also prepares an "instrument batch [summary]" or instrument run list. "It's a document where [the technician] basically transcribes the analytical results for each sample," for each day that the analytical batch at issue is tested. The numerical results transcribed by the technician appear on the machine-generated chromatogram for each sample or control in the analytical batch and the technician simply transcribes the numbers appearing on the machine printouts. Since two valid results are required for each batch, the batch summary or instrument run list is "a summary report of the results that were generated by the machine" for every sample and control in the analytical batch, on two different days. In this instance, Corina Anderson recorded the machine-generated results for the batch containing Delacruz's blood sample on the batch summary document. Anderson noted Delacruz's name, as well as the lab number associated with Delacruz's blood sample, on the batch summary. Next to his name and lab number, she transcribed his blood-alcohol concentration results as generated by the gas chromatograph in two different rounds of testing, each conducted on a different day.

Ruvalcaba testified: "Corina Anderson complete[d] [on October 25, 2013] the analytical packet[,] [which] includes the instrument run list and all the chromatograms associated with the case." Ruvalcaba then personally verified the results recorded on the batch summary by Anderson, by comparing Anderson's transcriptions against "the chromatograms that were generated by the instrument." Ruvalcaba testified: "I verified that the chromatograms match what was written on that batch summary, and I also verified that the [blood-alcohol concentration] results [for Delacruz's blood sample] [were] within our reporting criteria."

Ruvalcaba testified, with reference to two printouts or chromatograms generated by the gas chromatograph, that the first reportable blood-alcohol concentration result regarding Delacruz's blood sample was obtained on October 22, 2013 and the second reportable result was obtained on October 24, 2013 [the date of the test appears on the chromatographs]. As for the basis of her ultimate opinion that Delacruz's blood-alcohol concentration was 0.10 percent, Ruvalcaba testified: "I relied not only on those two records that we discussed [i.e., the chromatograms generated on October 22 and 24, 2013, respectively]. I also relied on the chain-of-custody records, the photographs taken of the evidence. I relied upon each chromatogram generated within this batch, including the chromatograms for the calibrators, the chromatograms for the controls, to form my opinion." When asked to explain the role of the chain-of-custody records, Ruvalcaba testified: "I relied on [chain-of-custody] records that are generated by the Kern Regional Crime Laboratory and I reviewed those records and reviewed each transaction within those records. I personally was not in any of the transactions within the chain of custody." Ruvalcaba discussed in detail the chain-of-custody records, which were marked as a court's exhibit for purposes of the Evidence Code section 402 hearing.

The prosecutor asked Ruvalcaba whether there was anything notated by Corina Anderson in any of the records underlying Ruvalcaba's ultimate opinion that could not be independently verified with respect to information generated by the gas chromatographer machine itself. Ruvalcaba answered that all the information needed for her opinion could be verified with reference to machine-generated records. Regarding the chain-of-custody records, she noted that the vials of Delacruz's blood were labeled with a barcode that was "associated with a lab number and an item number." She added that all transactions involving the vials were documented by scanning the barcode with a scanner and electronically recording that information in a computer. In short, the chain-of-custody documentation regarding the blood vials was also machine-generated.

Ruvalcaba worked on the case from October 25 to October 31, 2013. Ruvalcaba herself generated the “report of examination” that “describes the findings or results of the test.” The report is known as a “draft complete” at that stage. Ruvalcaba “completed the draft complete and stamped [her signature on] the report on October 31st, 2013.” The report of examination, which is contained in the trial court’s exhibit 4 in connection with the Evidence Code section 402 hearing, notes that Delacruz’s blood-alcohol concentration was 0.10 percent; Ruvalcaba initialed the report on October 29, 2013, and subsequently signed it under penalty of perjury.

Ruvalcaba’s conclusion that Delacruz’s blood-alcohol concentration was 0.10 percent was “not reported to the agency until after [all the relevant records and results] were technically reviewed by somebody else as well.” She testified: “After I approve the records, my records are then submitted to a secondary analyst, someone who is also qualified in the forensic alcohol testing program. They too review the records. They ensure that the policy and procedures were followed appropriately. They ensure that the instrument was operating correctly. And they ensure that the instrument was accurate. They then verify that the results match the chromatograms and that the results are reportable, meaning that now they can be released to the agency. Once the technical reviewer approves the records, they now stamp their signature on that report.” In this instance, the records were technically reviewed on November 1, 2013 by Criminalist Richard Maykoski, who also signed off on the report under penalty of perjury. Ruvalcaba further noted: “The final step of the entire process is the records are administratively reviewed, and that is usually performed by a supervisor or someone within the quality assurance unit. They review the records. They ensure that there are no misspellings. They review the chain-of-custodies to make sure that there are proper transactions for each appropriate date. Once they review those records, the report is now submitted to the agency.”

## **B. Admission of Ruvalcaba's Opinion did not Violate Confrontation Clause**

Following the Evidence Code section 402 hearing on the admissibility of her expert opinion, *at trial*, Ruvalcaba opined that the blood-alcohol concentration of Delacruz's blood, as provided by the CHP to the Kern Regional Crime Laboratory, was 0.10 percent. She testified that she did not personally conduct the forensic tests on Delacruz's blood sample; rather a forensic technician at the lab, Corina Anderson, ran the analytical batch containing the blood sample through a gas chromatograph machine on three occasions. Ruvalcaba explained that she herself conducted the subsequent blood-alcohol analysis. She independently determined that the gas chromatograph generated two reportable results (out of three runs), and based on the reportable results, Ruvalcaba calculated Delacruz's blood-alcohol concentration to be 0.10 percent (the average of the two reportable results, with each result being "within plus or minus five percent of the average"). She then prepared a report memorializing her conclusions for the CHP.

Although Ruvalcaba mentioned, in her trial testimony, that Corina Anderson tested Delacruz's blood using the gas chromatograph machine, Ruvalcaba did not describe specific actions taken or statements made by Anderson in conducting the tests. Nor did Ruvalcaba address, in her trial testimony, the final report submitted to the CHP or any of the records underlying her opinion, with specificity. On the contrary, she testified only *generally* about the chromatograms and chain-of-custody records that she consulted in formulating her opinion regarding the blood-alcohol concentration of Delacruz's blood. She testified: "I reviewed the raw data. I reviewed the calibration data, the controls that were [run]. I reviewed the results of the forensic testing. I reviewed the chain of custody that was associated with the case. I reviewed the photographs that were taken with the case. And then I made an interpretation as to the results that were generated and I was the one who signed off on the report." Finally, the "Report of Examination" prepared and signed by Ruvalcaba, and ultimately submitted to

the CHP, was not admitted into evidence at trial; neither were any of the records Ruvalcaba relied on in reaching her opinion.

As noted above, *People v. Sanchez*, *supra*, 63 Cal.4th 665 (*Sanchez*), provides the rule of decision for this case, even though it considered the admissibility of gang expert testimony. *Sanchez* explained that “[i]f an expert testifies to case-specific out-of-court statements to *explain the bases* for his opinion, those statements are necessarily considered by the jury *for their truth*, thus rendering them hearsay.” (*Id.* at p. 684 (italics added).) Thus, *Sanchez* clarified, “[w]hat an expert *cannot do is relate* [to the jury] as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception.” (*Sanchez*, *supra*, 63 Cal.4th at p. 686 (second italics added).) At the same time, *Sanchez* noted that “[a]ny expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so,” without violating either hearsay rules or the confrontation clause. (*Id.* at p. 685; see *Perez*, *supra*, 4 Cal.5th at p. 456 [“an expert may nonetheless ‘*rely on* hearsay in forming an opinion, and may tell the jury in general terms that he did so,’ without violating *hearsay rules* or *the confrontation clause*” (italics added)]; also see *People v. Garton* (2018) 4 Cal.5th 485, 506-507 (*Garton*) [testifying coroner’s own opinions, based on autopsy report prepared by a retired (nontestifying) coroner, not objectionable, where testifying coroner independently arrived at conclusions upon reviewing nontestifying coroner’s report and related documents and did not communicate, to jury, any out-of-court statements of nontestifying coroner].)

Under *Sanchez*, *Perez*, and *Garton*, Ruvalcaba could properly rely on inadmissible hearsay, including testimonial hearsay, in formulating her opinion. She could also properly testify as to her opinion, so long as she referred to its hearsay basis only in general terms. Here, Ruvalcaba explained to the jury, very generally, that her opinion to the effect that Delacruz’s blood-alcohol concentration was 0.10 was based on “reviewing records, including control records, test records, chain of custody [records], [and]



photographs of evidence,” which review allowed her “to make a final interpretation as to the results of [the] forensic testing.” Furthermore, the most important records generally referred to by Ruvalcaba, i.e., the chromatograms and chain of custody documentation, were not testimonial, or even hearsay, in the first instance, because they were machine-generated. (See *People v. Lopez* (2012) 55 Cal.4th 569, 583 [machine readouts are not testimonial “[b]ecause, unlike a person, a machine cannot be cross-examined”]; *Garton, supra*, 4 Cal.5th at p. 506 [“Only people can make hearsay statements; machines cannot.”];<sup>7</sup> *People v. Leon* (2015) 61 Cal.4th 569, 603 (*Leon*) [“A [hearsay] statement is defined ... as an ‘oral or written verbal expression [by] or ... nonverbal conduct of a person.’”].) In short, the trial court did not err in admitting Ruvalcaba’s opinion testimony.

Delacruz argues that the fact that Corina Anderson, a forensic technician, entered on the batch summary document, Delacruz’s name and lab number and further transcribed, on the same document, the test results for his blood sample, rendered Ruvalcaba’s opinion testimony inadmissible. However, this argument is unavailing because the batch summary was not introduced into evidence, nor were Corina Anderson’s hearsay statements otherwise related to the jury by Ruvalcaba. Furthermore, the only relevant information that Corina Anderson hand wrote on the batch summary were the two reportable test results for Delacruz’s blood sample, which results were independently verified by Ruvalcaba with reference to the pertinent chromatograms. As for Delacruz’s name and lab number as printed on the batch summary, it is unclear whether this information was manually entered into the applicable computer/machine or automatically entered by scanning the barcodes on the vials containing Delacruz’s blood. Whatever the case, Ruvalcaba could properly *rely* on this information in formulating her

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<sup>7</sup> *Garton* also clarified that photographs are not “statements” and, in turn, are not hearsay statements. (*Garton, supra*, 4 Cal.5th at p. 506 [“[Autopsy] photographs did not communicate out-of-court statements because photographs are not statements.”].)

opinion as to Delacruz's blood-alcohol concentration. (See *Leon, supra*, 61 Cal.4th at p. 603 ["It is ... clear that testimony relating the testifying expert's own, independently conceived opinion is not objectionable, even if that opinion is based on inadmissible hearsay."].)<sup>8</sup>

We further conclude that, even assuming, arguendo that admission of Ruvalcaba's opinion as to Delacruz's blood-alcohol concentration violated the confrontation clause, the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Here, Officer Scott Evans reported to the scene of the accident and spoke with Delacruz in the back of the ambulance. Evans testified that he had significant training and experience in evaluating whether a person was under the influence. Evans testified: "Once I got into the back of the ambulance with [Delacruz], I was able to smell a very strong odor of an alcoholic beverage inside the vehicle, inside the ambulance. I also noted his eyes were red and watery. And when he spoke it was with a slur." Evans observed that the strong alcohol odor was emanating from Delacruz's breath. Evans added that "[t]here were several beer cans in and around [Delacruz's] vehicle," and identified the cans in photographs of the scene. Finally, Evans described the result of the horizontal gaze nystagmus test he conducted on Delacruz at the hospital: "I saw all six of the six clues. I saw the lack of smooth pursuit. I saw the distinctive sustained nystagmus at maximum deviation, as well as the angle of onset prior to 45 degrees." Evans continued: "What I also observed in Mr. [Delacruz] was a vertical gaze nystagmus, which is when I complete the three [tests] I just showed you, I'll go up. And if you see the bouncing of the eyes at that point, that indicates a *high dosage* for that particular

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<sup>8</sup> *Leon* further explained: "A testifying expert can be cross-examined about these opinions. The hearsay problem arises when an expert simply recites portions of a report prepared by someone else, or when such a report is itself admitted into evidence. In that case, out-of-court statements in the report are being offered for their truth. Admission of this hearsay violates the confrontation clause if the report was created with sufficient formality and with the primary purpose of supporting a criminal prosecution." (*Leon, supra*, 61 Cal.4th at p. 603.)

person of [the relevant] intoxicant.” (Italics added.) Delacruz even admitted he had been drinking beer that night. On the basis of the foregoing evidence, Evans concluded that Delacruz was under the influence of alcohol at the time of the collision.

Criminalist Maria Sanchez also testified that she tested Delacruz’s blood, which tested positive for methamphetamine and amphetamine. Sanchez opined that the methamphetamine present in Delacruz’s system would not have negated the effects of alcohol in his system.

With regard to the charges of conviction, the prosecution was only required to prove that Delacruz drove under the influence of alcohol and/or drugs (not that Delacruz drove with a blood-alcohol concentration of 0.08 or higher). Officer Evans’s testimony, with or without the testimony of Maria Sanchez, was sufficient for this purpose.

In addition to the respective testimony of Evans and Sanchez regarding Delacruz’s intoxication, there was strong evidence that Delacruz caused the collision. First, the testimony of Embree’s wife, Britney, established that Embree had never drunk alcohol or used drugs in his life. Britney’s description of Embree’s activities before he took to the road on the morning of the accident, further precluded any inference to the effect that Embree was under the influence of alcohol or drugs at the time of the collision. Next, CHP Officer Bright determined that Delacruz was driving 85 miles per hour at the point of impact, in a blind curve with a 55-miles-per-hour speed limit. As for Embree, Bright determined his speed was 37 miles per hour at the point of impact. Bright noted that the speed determinations reflected a “high degree of certainty.” The defense expert endorsed Bright’s conclusions regarding the impact velocity of each vehicle. Both experts also agreed that Embree was braking hard in the moments before the collision, while there was no evidence that Delacruz was braking. Bright further testified that the oblique position and left-turn orientation of Embree’s truck at the point of impact, along with a drop-off to Embree’s right, indicated he was acting to evade Delacruz’s vehicle (which was headed into Embree’s lane on account of the curvature of the roadway). As for the

position of Delacruz's vehicle at the specific point of impact, it was astraddle and parallel to the roadway's center divide, a position that did not indicate evasive action on Delacruz's part. Indeed, even the defense expert failed to posit a plausible scenario, based on the impact positions of the two vehicles, that would suggest that Delacruz was taking evasive action. Given this record, we conclude that any error in admitting Ruvalcaba's opinion regarding the precise blood-alcohol concentration of Delacruz's blood, had no effect on the outcome of this case.

## ***II. Officer Bright's Testimony: No Indications that Embree was Impaired***

When asked whether he had considered, in the accident reconstruction investigation, the state of intoxication of each vehicle operator, Officer Bright testified: "Well, Mr. Embree, there were no indications that he was impaired in any way." Delacruz argues Bright's testimony on his point violated his constitutional rights to confrontation and due process. We reject his contention.

Bright simply provided his opinion, based on a review of the evidence developed in the course of the investigation, that there was no indication that Embree was impaired in any way. The basis for his opinion was, potentially, a toxicology analysis of Embree's blood and/or a statement from Embree's wife (given that the latter testified at trial that Embree had never used alcohol or drugs in his life). As noted above, an expert may properly rely on hearsay statements in formulating his opinion, so long as case-specific facts in the hearsay statements are not related to the jury. (See *Sanchez, supra*, 63 Cal.4th 665, 684-686 [expert is only prohibited from relating as true case-specific facts asserted in hearsay statements].) Here, Bright indicated his opinion was based on evidence gathered in the investigation, which would reasonably have encompassed hearsay statements, but he did not relate any case-specific facts to the jury. (*Id.* at pp. 685-686 ["Any expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so."]; see *Perez, supra*, 4 Cal.5th at p. 456.) Accordingly, there was no error.

In any event, any confrontation clause error was harmless beyond a reasonable doubt. (*Perez, supra*, 4 Cal.5th at p. 457.) The expert’s testimony simply corroborated the trial testimony of Embree’s wife, Britney. Britney testified Embree had never consumed alcohol or drugs in his life. Britney also described the hours Embree spent at home before driving off to work on the morning of the accident and her description precluded any inference that he used the time to drink or consume drugs. Defense counsel did not cross-examine Britney on these issues and her testimony remained uncontroverted. Thus, Britney’s testimony on its own would have allowed the jury to conclude Embree was not driving under the influence of alcohol and/or drugs at the time of the collision. At the same time, as explained above, the case against Delacruz was strong. The evidence showed that Delacruz was driving under the influence of alcohol and methamphetamine, he was driving at excessive speed into a curve, his vehicle was over the roadway’s center divide at the time of the collision, there was no evidence he braked prior to the collision, and he did not appear to be undertaking an evasive maneuver. Accordingly, even had the court excluded Bright’s challenged testimony, the jury would not have reached a different result. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

#### **DISPOSITION**

The judgment is affirmed.

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SMITH, J.

WE CONCUR:

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PEÑA, Acting P.J.

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DESANTOS, J.